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No. 79-1770

In the Supreme Court of the United States

OCTOBER TERM, 1979

ROBERT J. SWINEHART, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the government violated petitioner's rights through the consensual recording or subsequent use of certain conversations that petitioner had, prior to the return of this indictment, with a business associate who was also an attorney.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 614 F.2d 853.

JURISDICTION

The judgment of the court of appeals (Pet. App. 13a-14a) was entered on January 17, 1980, and a petition for rehearing was denied (Pet. App. 15a) on March 7, 1980. On April 4, 1980, Mr. Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including May 6, 1980 (Pet. App. 17a), and the petition was filed on May 5, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner and co-defendant Robert Perry were indicted on June 29, 1978, in the United States District Court for the Eastern District of Pennsylvania on 21 counts of embezzlement from an employee benefit fund (18 U.S.C. 664) and bankruptcy fraud (18 U.S.C. 152), arising out of the bankruptcy of Hourly Messengers, a Philadelphia delivery service, of which petitioner and Perry were majority shareholders and principal officers. The bankruptcy petition was filed in 1974. In 1976, while petitioner's fraudulent activities were ongoing, the government secured the cooperation of attorney Arthur Kafrissen, another shareholder in Hourly Messengers, who agreed to record his conversations with petitioner. The government provided

petitioner with the recorded conversations after his indictment in June 1978.

In October 1978 a two-week suppression hearing was held on petitioner's and Perry's claims that the government had improperly derived evidence from immunized testimony that they had given at a creditors' meeting. Transcripts of the taped conversations between petitioner and Kafrissen were marked as exhibits at the suppression hearing, and petitioner did not contend at that time that the government had violated his attorney-client privilege or Sixth Amendment rights.

The trial court denied the suppression motions. Plea negotiations followed and, on October 16, 1978, both defendants entered into substantially identical plea agreements. Petitioner pleaded guilty to five counts of the indictment, and the government agreed that an appropriate sentence would be 18 months' imprisonment, five years' probation, and restitution (Pet. App. 3a). The plea agreement provided that petitioner would "fully cooperate" with the government by giving truthful testimony and "unreserved disclosure," and further required that he "take" any polygraph examinations that the government might request (Pet. App. 3a–4a). Moreover, the agreement gave the government "sole discretion" to determine whether petitioner's cooperation had been sufficient (Pet. App. 4a).

When petitioner failed a polygraph examination prior to sentencing, the government concluded that he was not cooperating as required by the agreement,

and it refused to recommend the sentence that had been agreed upon (Pet. App. [redacted] 4a–5a).

Petitioner then moved to withdraw his guilty plea or, alternatively, for specific enforcement of the agreement. The district court heard evidence and concluded that the government had not abused its discretion in refusing to recommend the 18-month sentence (Pet. App. [redacted] 5a–6a).[1] The government's evidence showed how the polygraph had been interpreted and why the government concluded that petitioner had provided inconsistent information. That conclusion was based upon the polygraph results, upon information supplied by the Philadelphia District Attorney, and partly upon two recorded conversations between petitioner and Kafrissen (Pet. App. 5a n.1).[2] The district court denied petitioner's motion, sentenced him to three years' imprisonment and five years' probation, and imposed a requirement of restitution (Pet. App. 6a).

In the decision that is challenged here, the court of appeals vacated and remanded, holding that a further hearing was necessary to determine the validity of petitioner's contention that the plea agreement re-

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[1] Co-defendant Robert Perry had entered into a plea agreement that was virtually identical, except that his recommended term of imprisonment was to be only one year and one day (Pet. App. 3a). The court found that Perry had also breached the agreement, and he was sentenced to 18 months' imprisonment (Pet. App. 6a).

[2] The district court admitted the conversations, not for the truth of the matters asserted therein, but for the limited purpose of demonstrating inconsistencies in the information that petitioner had provided under the agreement (see Sentencing Transcript ("S. Tr.") 218–219).

quired him only to "take"—rather than "pass"—a polygraph examination. Petitioner also argued that his attorney-client privilege or Sixth Amendment rights had somehow been violated, but the court of appeals rejected that contention, noting that petitioner had failed to establish the existence of an attorney-client relationship with Kafrissen, that petitioner had not preserved his objection at the suppression hearing and that the trial court had not relied on the tapes in imposing sentence in any event (Pet. App. 5a n.1). Judge Sloviter dissented on the ground that the attorney-client privilege claim should also be remanded for further fact-finding (Pet. App. [redacted] 10a–12a).

ARGUMENT

1. We note at the outset that petitioner's conviction and sentence have been vacated by the court of appeals and the case has been remanded for further findings on the issue of petitioner's compliance with the plea agreement. It is possible that petitioner will succeed in showing that the agreement required him only to submit to—rather than pass—a polygraph examination, in which case petitioner may be entitled either to plead anew or to obtain specific performance of the agreement. In any event, petitioner's present claim is interlocutory and need not be reviewed at this stage of the proceedings.

2. On the merits, petitioner's contentions are unfounded. The recording of petitioner's conversations with Kafrissen, which occurred with the latter's consent, did not violate petitioner's rights under the Fourth, Fifth or Sixth Amendments. Petitioner volun-

tarily chose to engage in conversations with Kafrissen, whose consent precluded any claim that petitioner's Fourth or Fifth Amendment rights were violated. See *Hoffa* v. *United States*, 385 U.S. 293 (1966); *Lopez* v. *United States*, 373 U.S. 427 (1963). Petitioner's Sixth Amendment claim would also lack merit, even if he had been consulting Kafrissen as an attorney, because the recordings were made almost two years before the return of this indictment, well before any "critical stage" of this prosecution (S. Tr. 215–216; Court of Appeals Supplemental Appendix ("App.") 114–A). See *Powell* v. *Alabama*, 287 U.S. 45 (1932).[3]

3. Petitioner apparently contends that the government's limited use of the recordings to demonstrate its basis for abandoning the plea agreement violated either his attorney-client privilege or some other unspecified rights related thereto. That argument lacks merit for several reasons. First, there was no violation of any valid attorney-client privilege. The district court apparently held that the privilege was waived under the fraud exception (S. Tr. 218–219), while the court of appeals held that petitioner had not carried his burden of proving that Kafrissen was his lawyer (Pet. App. 5a n.1). Since there was no valid attorney-client

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[3] Petitioner contends generally (Pet. 9) that the government's misconduct tainted the prosecution from the outset and "cannot result in a constitutionally valid conviction." While it is difficult to respond to petitioner's generalizations, petitioner apparently conceives of Kafrissen's cooperation as government misconduct that somehow violated the Sixth Amendment by violating petitioner's attorney-client privilege. Both courts below have held that no valid attorney-client privilege was involved here. The district court apparently held that the attorney-client privilege had been waived because of petitioner's on-going fraud

privilege in either event, neither the creation nor any subsequent use of the tapes was improper. Second, petitioner's objection to the tapes was untimely. Petitioner was provided with the tapes before he entered his guilty plea, and he was thus well aware of

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(S. Tr. 218–219), while the court of appeals found that petitioner had not even established that Kafrissen was his attorney (Pet. App. 5a n.1).

The court of appeals properly held that petitioner had not carried the burden of proving an attorney-client relationship. See *In re Grand Jury Empanelled February 14, 1978*, 603 F.2d 469, 474 (3d Cir. 1979); *United States* v. *Landof*, 591 F.2d 36, 38 (9th Cir. 1978); *United States* v. *Stern*, 511 F.2d 1364, 1367 (2d Cir.), cert. denied, 423 U.S. 829 (1975). At sentencing, petitioner's counsel baldly asserted that Kafrissen was petitioner's attorney at the time of the consensual overhearings (S. Tr. 217, 335). Petitioner makes the same generalized assertion here (see Pet. 3), but the record flatly contradicts it. Kafrissen testified that he was himself represented by counsel during the relevant period, and the only reference to petitioner was as a "former" client (Suppression Hearing Transcript (7th day) ("H. Tr.") 7–39 to 7–42, 7–44 to 7–45). Petitioner did not challenge that characterization. The only evidence that even tends to support petitioner's contention consists of a few isolated references to legal matters that petitioner has distilled from the voluminous transcript of the overhearings (see Pet. App. 22a–24a). Those references are not persuasive. Given a continuing business relationship, particularly a relationship in which one of the principals is a lawyer and the business is engaged in illegality, it is inevitable that business discussions will occasionally involve matters that have legal significance. Such isolated references are insufficient, however, to establish the existence of an attorney-client relationship. See 8 Wigmore, *Evidence* § 2292 (McNaughton rev. ed. 1961). Moreover, the record clearly establishes an on-going fraud that would defeat the attorney-client privilege in any event. *Clark* v. *United States*, 289 U.S. 1 (1933); *United States* v. *Aldridge*, 484 F.2d 655 (7th Cir. 1973), cert. denied, 415 U.S. 921 (1974). There is thus no basis for asserting that the government acted improperly in obtaining Kafrissen's cooperation in its investigation of petitioner.

whatever claim he might have had. He had a two-week suppression hearing on his claim that the government's evidence was derived from immunized testimony. If petitioner believed that the tapes had been created in violation of his rights under the Sixth Amendment or the attorney-client privilege, or that their use would violate those rights, he should have moved to suppress or for other appropriate relief at that time. See Fed. R. Crim. P. 12. Instead, he chose to enter a plea with full knowledge of the underlying facts.[4]

4. Petitioner also complains that his rights were denied by the court's use of the tapes at sentencing. That contention has no merit because the record contains no evidence to suggest that the district court considered the recordings in determining the sentence to be imposed. The district judge specifically stated that he was "starting from scratch" in determining an appropriate sentence, without any reliance on the plea agreement, and that he was well familiar with the nature of petitioner's criminal conduct and the harm that

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[4]Petitioner attempts to explain his inaction by stating that the government had "advised defense trial counsel that it would not use the transcripts" (Pet. 3). The affidavit of petitioner's trial counsel, however, states only that he was advised "that the government did not intend to use the transcripts of taped conversations between [petitioner] and Arthur Kafrissen *as part of their evidence-in-chief*" (Pet. App. 25a; emphasis added). If there had been any merit to petitioner's contention that the recordings violated a genuine attorney-client relationship, it is inconceivable that he would have failed to pursue his claim simply because of that representation. Moreover, if the conversations had been privileged, petitioner's failure to protect the privilege would have resulted in a waiver long ago. See *Velsicol Chemical Corp.* v. *Parsons*, 561 F.2d 671 (7th Cir. 1977), cert. denied, 435 U.S. 942 (1978).

had been done (App. 96-A to 97-A, 103-A). The court made no reference to the recorded conversations, which it had previously admitted only for the limited purpose of determining whether the plea bargain had been breached (S. Tr. 218-219).

5. Petitioner erroneously asserts that the decision below is inconsistent with the Third Circuit's prior decisions in *United States* v. *Morrison*, 602 F.2d 529 (3d Cir. 1979), cert. granted, No. 79-395 (June 30, 1980), and *United States* v. *Levy*, 577 F.2d 200 (3d Cir. 1978). Petitioner's assertion is ill-founded in that those cases both involved situations in which the existence of a valid attorney-client relationship was not at issue. Because petitioner is unable to prove the existence of any attorney-client privilege that could survive his on-going fraud, the holdings of those cases are inapposite, and this Court's decision in *Morrison* could not affect the outcome here.[5]

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[5] We reiterate in this connection that this case is presently at an interlocutory stage. Accordingly, even in the unlikely event that this Court's decision in *Morrison* could have some relevance to petitioner's situation, there is no reason to delay further proceedings in the district court pending disposition of *Morrison*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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